STATE OF MINNESOTA
IN COURT OF APPEALS
A11-741

State of Minnesota,
Respondent,

vs.

Noe Campos,
Appellant.

Filed May 21, 2012
Affirmed
Johnson, Chief Judge

Lyon County District Court
File No. 42-CR-10-1040

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Richard R. Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Johnson, Chief Judge; and Randall, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

JOHNSON, Chief Judge

A Lyon County jury found Noe Campos guilty of burglary and three drug-related offenses based on evidence that he and two other men attempted to manufacture methamphetamine at an abandoned farmhouse near the city of Tracy. On appeal, Campos contends that his convictions are based solely on the testimony of his accomplices, that two types of erroneously admitted evidence deprived him of a fair trial, and that he received ineffective assistance of counsel. We affirm.

FACTS

The conduct for which Campos was charged and convicted occurred on August 25, 2010. Campos and two acquaintances, David Norman and Michael Klein, spent the morning socializing at Campos's home. Norman had previously talked to Klein about manufacturing methamphetamine, and they talked about that topic again on this day. In the afternoon, Norman agreed to pick up some supplies for use in the manufacturing process, such as lithium batteries, camping fuel, and hand-warming packs. Campos agreed to accompany Norman on this errand.

Norman and Campos got a ride to a Walmart store. A video-recording from the store's security system shows Campos and Norman making purchases at a self-service checkout station at 2:14 p.m. The video-recording shows Campos scanning items, bagging them, and interacting with the computer screen, while Norman paid for the supplies with cash.

Klein and his wife, A.K. (who is Norman's sister), picked up Norman and Campos from Walmart. Campos later purchased Sudafed at a Cash Wise pharmacy using Norman's money. The pharmacy's pseudoephedrine logbook reveals that Campos purchased 30 milligrams of pseudoephedrine at 5:00 p.m.

The group then went to the Kleins' house to pick up more supplies, including a Pyrex-brand glass dish and tools, and also to discuss where they were going to manufacture the methamphetamine. While at the Kleins' house, Norman and Campos talked further about manufacturing methamphetamine and what to do with the resulting product. A.K. became upset with the men's scheme and asked them to leave. The three men departed in Klein's car.

The three men drove into the country, with Campos sitting in the back seat. At approximately 7:00 p.m., they stopped at an old farmhouse near Tracy, which was owned by C.N., who was in the process of fixing it up. C.N. was working in the yard when Klein's car pulled into the driveway. Norman and Campos exited the vehicle, and Campos took a step towards the farmhouse, while Norman opened the trunk. But after the men noticed C.N., they got back into Klein's car and drove away. At trial, C.N. identified Campos as one of the two men who briefly exited the car at his farmhouse.

The three men then went to another abandoned farmhouse, which was owned by C.M. Meanwhile, C.N. had called law enforcement to report the incident that had occurred at his farmhouse. Officer Jason Lichty and Deputy Adam Connor searched for Klein's vehicle. Deputy Connor found the vehicle parked at C.M.'s farmhouse. Officer Lichty joined Deputy Connor, saw the vehicle, and determined that it was owned by

Klein. As the officers approached the house, they heard the sound of breaking glass. Officer Lichty commanded the individuals to come out. Klein, Norman, and Campos exited the farmhouse and were arrested. C.M. testified at trial that he did not give anyone permission to enter his property.

When Officer Lichty and Deputy Connor entered the farmhouse, they noticed items consistent with a methamphetamine laboratory, including batteries that had been taken apart, tools, and suspicious containers with liquid and battery parts in them. Another officer at the scene, Investigator Tony Rolling, took photographs of those items and documented the existence of other items, including a Pyrex-brand glass dish, coffee filters, dishwashing gloves, a kerosene bottle, and paper with white powder on it. C.N. later identified the three men as the same men who were at his farmhouse earlier in the evening.

The next day, the state charged Campos with four felony offenses: (1) first-degree conspiracy to manufacture methamphetamine, a violation of Minn. Stat. §§ 152.021, subd. 2a(a), .096, subd. 1 (2010); (2) attempt to manufacture methamphetamine as a principal or aiding and abetting another, a violation of Minn. Stat. §§ 152.021, subd. 2a(a), 609.05, subd. 1, .17 (2010); (3) possession of substances with intent to manufacture methamphetamine as a principal or aiding and abetting another, in violation of Minn. Stat. §§ 152.0262, subd. 1(a), 609.05, subd. 1 (2010); and (4) third-degree burglary as a principal or aiding and abetting another, in violation of Minn. Stat. §§ 609.582, subd. 3, .05, subd. 1 (2010). The complaint identified Campos's accomplices as Klein and Norman.

A two-day trial was held in December 2010. The state called nine witnesses: A.K., Norman, C.N., C.M., and five law-enforcement officers. Campos did not testify or introduce any evidence. The jury found Campos guilty on all counts. The district court sentenced Campos to 100 months of imprisonment on the first count and imposed a concurrent sentence of 18 months of imprisonment on the second count. Campos appeals.

D E C I S I O N

I. Corroboration of Accomplice Evidence

Campos first argues that the evidence is insufficient to support his convictions because the guilty verdicts are based solely on the uncorroborated testimony of his accomplices, Norman and Klein.

"A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense." Minn. Stat. § 634.04 (2010). Evidence of "corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." *Id.* Rather, the corroborating evidence "must link or connect the defendant to the crime . . . [by] point[ing] to the defendant's guilt in some substantial degree." *State v. Adams*, 295 N.W.2d 527, 533 (Minn. 1980); *see also State v. Usee*, 800 N.W.2d 192, 200 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). Corroborating evidence includes physical evidence, testimony of eyewitnesses and experts, admissions by the defendant, and conduct by the defendant before and after the crime. *State v. Pederson*, 614 N.W.2d 724, 732 (Minn. 2000). As with any other challenge to the sufficiency of the evidence,

this court "review[s] the sufficiency of the corroborating evidence of an accomplice's testimony . . . in the light most favorable to the prosecution and with all conflicts in the evidence resolved in favor of the verdict." *Usee*, 800 N.W.2d at 200.

Campos contends that the non-accomplice evidence is insufficient because it suggests that he was merely a bystander to the crimes of others. In this part of his brief, Campos refers generally to the convictions of conspiracy to manufacture methamphetamine, aiding and abetting the manufacture of methamphetamine, and burglary, but he does not analyze the evidence separately with respect to each conviction. The longer of Campos's two sentences is based on his conviction on the first count, conspiracy to manufacture methamphetamine.

A person is guilty of engaging in a conspiracy if he "conspires with another to commit a crime and in furtherance of the conspiracy one or more of the parties does some overt act in furtherance of such conspiracy." Minn. Stat. § 609.175, subd. 2 (2010). The trial record contains ample corroborating evidence of Campos's participation in a conspiracy to manufacture methamphetamine. First, Campos's pre-trial statement to Special Agent Dan Louwagie of the Minnesota Bureau of Criminal Apprehension corroborates Norman's testimony that Campos knew, prior to going to Walmart, that he and Norman were purchasing supplies for the purpose of manufacturing methamphetamine. Second, the Walmart video-recording corroborates Norman's testimony that he and Campos purchased supplies at Walmart. Third, the logbook from the Cash Wise pharmacy corroborates Norman's testimony that Campos purchased pseudoephedrine, which is commonly used to manufacture methamphetamine. Fourth,

C.N.'s testimony corroborates Norman's testimony that Campos emerged from Klein's vehicle at C.N.'s farmhouse while Norman started to remove supplies from the trunk. Fifth, the testimony of Officer Lichty corroborates Norman's testimony that Campos was at C.M.'s farmhouse while the three of them set up a methamphetamine laboratory. This non-accomplice evidence is sufficient to prove that Campos was not merely a bystander but, rather, conspired with others and took actions in furtherance of the conspiracy. Thus, the non-accomplice evidence is sufficient to support Campos's conviction of conspiracy to manufacture methamphetamine.

II. Cumulative Error

Campos also argues that the cumulative effect of two evidentiary errors denied him a fair trial. If an appellant establishes that a district court committed two or more procedural errors, none of which individually requires a new trial, the appellant nonetheless may be entitled to a new trial "if the errors, when taken cumulatively, had the effect of denying appellant a fair trial." *State v. Jackson*, 714 N.W.2d 681, 698 (Minn. 2006) (quotation omitted); *see also State v. Erickson*, 610 N.W.2d 335, 340-41 (Minn. 2000).

Campos contends that the district court plainly erred by admitting two types of testimony by Agent Louwagie. Specifically, Campos contends that the district court plainly erred by (1) admitting Agent Louwagie's testimony concerning his interview of Klein, in violation of Campos's rights under the Confrontation Clause, and (2) allowing Agent Louwagie to testify that Norman and Campos were not truthful in their respective interviews. Campos contends that, without this evidence, the jury might have acquitted

him on the ground that he merely was present at the scene of the crime but did not actively participate in it.

A. Confrontation Clause

The testimony at issue was given by Agent Louwagie, who interviewed Campos, Norman, and Klein on the evening of August 25, 2010. Agent Louwagie testified about his interview of Klein, including the substance of Klein's answers to his questions. The district court interrupted this line of questioning and called a sidebar conference. The district court noted that Agent Louwagie's testimony appeared to consist of hearsay. The district court asked defense counsel whether she had a reason for not objecting to the evidence. Defense counsel initially responded in an equivocal manner but, after further discussion, asserted an after-the-fact objection and a motion to strike.

The district court excused the jury so that counsel could present arguments concerning the admissibility of the testimony. The state argued that the testimony was admissible as co-conspirator testimony under rule 801(d)(2)(E) of the Minnesota Rules of Evidence. The district court called a recess to allow for further consideration of the state's asserted basis for the evidence. After resuming the hearing, the district court rejected the state's argument on the ground that the statements were made to Agent Louwagie after the conspiracy was over, not during or in the course of the conspiracy. Accordingly, the district court ruled that Agent Louwagie's testimony concerning Klein's out-of-court statements is inadmissible, and the district court prohibited the state from eliciting further testimony of that type from Agent Louwagie. But the district court denied the motion to strike on the ground that defense counsel had made a conscious

decision to not object to the testimony. Defense counsel did not ask for a curative instruction.

Because Campos did not object to Agent Louwagie's testimony before it was given, the plain-error test applies. *See State v. Tscheu*, 758 N.W.2d 849, 863 (Minn. 2008) (applying plain-error rule to Confrontation Clause argument where defendant did not object at trial). Under the plain-error test, we may not grant appellate relief on an issue to which there was no objection unless (1) there is an error, (2) the error is plain, and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is clear or obvious, *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), and an error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the first three requirements of the plain-error test are satisfied, it would be appropriate to consider the fourth requirement, which asks whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

The state concedes that the first requirement of the plain-error test is satisfied because Agent Louwagie's testimony concerning Klein's pre-trial statement is inadmissible under the Confrontation Clause. *See Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 (2004). The state further concedes that the second requirement of the plain-error test is satisfied. We decline to accept the second concession because it is not supported by the record and the caselaw. *See State v. Boldman*, ____ N.W.2d

____, 2012 WL 1318316, at *3 (Minn. Apr. 18, 2012); *State v. Thompson*, 578 N.W.2d 734, 742 (Minn. 1998).

Because of the lack of an objection, "the question . . . is *not* whether the [district] court erred in admitting the testimony, because the [district] court was not given the opportunity to make that decision." *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001). Rather, the pertinent question is whether the district court failed to take some action *sua sponte*. *Id.* In fact, the district court did act *sua sponte*, albeit after some inadmissible evidence had been admitted. Campos can complain only that the district court did not act sooner. But the district court did not plainly abuse its discretion by waiting until the nature of the testimony became clear. Indeed, the district court handled the situation in an admirably careful and thorough manner. The district court's unprompted intervention served to protect Campos's rights and allowed for full consideration of the parties' arguments for and against admission of the evidence. Notably, Campos does not challenge the district court's denial of the motion to strike. And the district court's decision not to give a curative instruction *sua sponte* is not plainly erroneous because such an instruction may direct more attention to potentially prejudicial issues. *See State v. Vance*, 714 N.W.2d 428, 443 (Minn. 2006). Thus, Campos has not satisfied the second requirement of the plain-error test, which forecloses inquiry into whether the asserted error prejudiced his defense.

B. Comment on Credibility

Agent Louwagie also testified about his pre-trial interviews of Campos and Norman. Agent Louwagie testified that Campos told him, among other things, that he

stayed outside the Walmart while Norman purchased supplies and that he merely accompanied Norman and Klein but did not enter M.C.'s farmhouse. On redirect examination, Agent Louwagie testified as follows:

> Q: In your experience as a law enforcement officer trained in conducting interviews and interrogations, did you have opportunity to determine whether or not [Campos] was telling you the full truth at that time?
>
> A: Yes.
>
> Q: And what did you determine?
>
> A: That he was not telling the truth or the complete truth.

Defense counsel did not object to this testimony.

Agent Louwagie also testified about his interview of Norman, as follows:

> Q: In your training and your experience, do you look for indicators to know whether or not someone is telling you the truth?
>
> A: Yes.
>
> Q: . . . when you interviewed David Norman did you see any indicators as to whether or not he was telling the truth on August 25, 2010?
>
> A: Yes.
>
> Q: Okay, explain to the jury . . . what your observations were.
>
> . . .
>
> A: . . . a lot of minimizing, blaming others, not very much detail within the interview when asked specific questions.

Defense counsel also did not object to this testimony. Agent Louwagie gave similar testimony about a second interview of Norman, again without objection.

Campos contends that Agent Louwagie improperly vouched against his and Norman's credibility by testifying that they were not truthful in their interviews with him. It is improper for a witness to "vouch for or against the credibility of another witness." *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). In *State v. Ellert*, 301 N.W.2d 320 (Minn. 1981), for example, the supreme court held that it was error for a police officer to testify that the defendant lied when she made a pre-trial statement to the officer. *Id.* at 323.

The state again concedes the first requirement of the plain-error test on the ground that Agent Louwagie's testimony was inadmissible. The state does not take a position on the second requirement of the plain-error test, which asks whether the error was plain. For the purposes of this opinion, we will assume without deciding that the admission of the evidence was plain error.

C. Prejudice

Assuming that the first and second requirements of the plain-error test are satisfied for the second contention, which concerns Agent Louwagie's testimony about Norman's and Campos's untruthfulness, we next analyze whether the erroneous admission of that evidence affected Campos's substantial rights. *See Griller*, 583 N.W.2d at 740. Campos's argument fails because the jury already had reasons to believe that Norman and Campos had lied to Agent Louwagie during their respective interviews. In fact, Norman admitted at trial that he was not completely truthful with Agent Louwagie during

each of his two interviews because he was afraid of being charged with a crime. Furthermore, Campos cannot complain about Agent Louwagie's testimony about Norman's untruthfulness because his trial counsel attempted to capitalize on that evidence in her closing argument by asserting that "Mr. Norman is inherently unreliable" because he "lied in his first interview" and "lied in his second interview."

Similarly, the jury had other evidence of Campos's untruthfulness. The Walmart video-recording plainly shows Campos at the check-out counter, assisting Norman in purchasing supplies, notwithstanding Campos's statement to Agent Louwagie that he did not enter the Walmart store. *See State v. Wembley*, 712 N.W.2d 783, 792 (Minn. App. 2006) (holding that erroneously admitted evidence did not affect verdict because jury watched video that provided them with other evidence on same subject), *aff'd* (Minn. Mar. 8, 2007). In addition, the district court instructed the jury that it is the sole judge of credibility, which diminishes the effect of the challenged evidence. *In re Welfare of D.D.R.*, 713 N.W.2d 891, 900 (Minn. App. 2006). For these reasons, there is no "reasonable probability that the error[s] actually impacted the verdict." *Jackson*, 773 N.W.2d at 121. Thus, Campos cannot establish that he was prejudiced by any error in the admission of Agent Louwagie's testimony concerning Norman's and Campos's untruthfulness.

If we were to also consider whether Campos was prejudiced by the admission of Agent Louwagie's hearsay testimony concerning his interview of Klein, or by the cumulative effect of both types of inadmissible evidence, we would reach the same conclusion. Klein's statements to Agent Louwagie were consistent with the other

evidence that the jury already had heard, including but not limited to Norman's trial testimony. In addition, Klein's out-of-court statements did not directly implicate Campos in the conspiracy.

Thus, Campos is not entitled to a new trial on the basis of the cumulative effect of those parts of the testimony of Agent Louwagie that Campos claims were erroneously admitted.

III. Ineffective Assistance of Counsel

Campos last argues that he received ineffective assistance of counsel because his trial counsel failed to object to the inadmissible evidence discussed in part II.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. Const. amend. VI. The right to the assistance of counsel includes the right to the *effective* assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). To prevail on a claim of ineffective assistance of counsel, a postconviction petitioner "must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for his counsel's unprofessional error, the outcome would have been different." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (citing *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2064-65).

An appellate court need not analyze both prongs of the *Strickland* test if an analysis of one prong is determinative. *Id.*; *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). At the least, Campos's ineffectiveness argument fails on the second prong. Campos cannot establish the second prong because, as explained above in part II, he

cannot show that the evidence admitted due to trial counsel's alleged ineffectiveness affected the verdict. If the admission of challenged evidence does not satisfy the third requirement of the plain-error test, the admission of that evidence also does not satisfy the second prong of the *Strickland* test. *Reed v. State*, 793 N.W.2d 725, 735-36 (Minn. 2010). Thus, Campos is not entitled to relief on the ground that he received ineffective assistance of counsel.

Affirmed.